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Attorney for Debtor

10 **UNITED STATES BANKRUPTCY COURT**
11 **DISTRICT OF NEVADA**

12 In re:

CASE NO. BK-N-09-52807-gwz
Chapter 13

13 KRISTEN GILBERT,

14 Debtor.

**MOTION TO VALUE COLLATERAL AND
MODIFY AND RECLASSIFY SECOND
MORTGAGE AS GENERAL UNSECURED
CLAIM PURSUANT TO 11 U.S.C. §§ 506(a)
AND 1322**

Hearing Date: December 18, 2009
Hearing Time: 2:00 p.m.

19 _____/
20 KRISTEN GILBERT ("Debtor"), by and through her attorney, TRICIA M. DARBY hereby
21 moves this Court for an order establishing the value of real property collateral located at 5185 Mesa
22 Verde Court, Sparks, Nevada 89436 securing the certain second mortgage lien held by EMC
23 ("EMC") and for an order modifying that mortgage lien claim by stripping off the lien and
24 reclassifying and rendering the entire claim a general unsecured claim in this case. This Motion is
25 made pursuant to 11 U.S.C. §§ 506(a) and 1322, and Federal Rules of Bankruptcy Procedure
26 (F.R.B.P.) 3012 and 9014, and is supported by the *Declaration of Kristen Gilbert* and the following
27 points and authorities.
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POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

1. On August 20, 2009, the Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code (the "Petition Date").

2. On the Petition Date, the Debtor owned real property located at 5185 Mesa Verde, Sparks, Nevada, 89436 (the "Mesa Verde Property"). On the Petition Date, the value of the Mesa Verde Property was \$215,000.00. *See Declaration of Kristen Gilbert.*

3. As of the Petition Date, the Mesa Verde Property was subject to first deed of trust securing a first mortgage held by Homeq (the "Homeq First Mortgage") in the amount of \$242,591.00.

4. As of the Petition Date, no equity existed in the Mesa Verde Property above the Homeq First Mortgage.

5. Also, as of the Petition Date, Mesa Verde Property was subject to a second priority deed of trust securing a second mortgage held by EMC in the amount of \$39,190.00 (the "EMC Second Mortgage"). However, due to the \$215,000.00 value of the Mesa Verde Property and the superior priority \$242,591.00 Homeq First Mortgage, the EMC Second Mortgage was wholly unsecured and would receive nothing upon a liquidation of the Mesa Verde Property for the fair market value.

II. LEGAL AUTHORITY AND ARGUMENT

**THE EMC SECOND MORTGAGE SHOULD BE AVOIDED AND RECLASSIFIED
BECAUSE IT IS UNSECURED AND WOULD RECEIVE NOTHING IN A LIQUIDATION**

Pursuant to 11 U.S.C. § 506(a), an allowed claim is only a secured claim to extent of the value of creditor's interest in subject collateral, and is an unsecured claim to extent amount of claim exceeds

1 that value. In this regard, Federal Rule of Bankruptcy Procedure Rule 3012 provides that this Court
 2 may determine the value of a claim secured by a lien on property in which the estate has an interest
 3 on motion of any party in interest and after a hearing on notice to the holder of the secured claim.

4 The Ninth Circuit Court of Appeals has confirmed that a wholly unsecured lien may be
 5 avoided entirely and reclassified as a general unsecured claim pursuant to 11 U.S.C. 506 (a).
 6 Specifically, the Court of Appeals in Zimmer explained:
 7

8 Section 506(a) divides creditor's claims into "secured claims" and
 9 "unsecured claims." Although the conventional interpretation of
 10 "secured" might include any claim in which the creditor has a security
 11 interest in the debtor's property, 506(a) makes clear that the status of a
 12 claim depends on the valuation of the property... To put it more simply, a
 13 claim such as a mortgage is not a "secured claim" to the extent that it
 14 exceeds the value of the property that secures it. Under the Bankruptcy
 15 Code, "secured claim" is thus a team of art; not every claim that is
 16 secured by a lien on property will be considered a "secured claim." Here,
 17 it is plain that PSB Lending's claim for the repayment of its loan is an
 18 unsecured claim, because its deed of trust is junior to the first deed of
 19 trust, and the value of the loan secured by the first deed of trust is greater
 20 than the value of the house.

21 In re Zimmer, 313 F.3d 1220, 1223 (9th Cir. Cal. 2002).

22 To effectuate the principles of 11 U.S.C. §506(a), 11 U.S.C. §1322(b)(2) provides that a
 23 Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only
 24 by a security interest in real property that is the debtor's principal residence" The Supreme Court
 25 has held that this provision prohibits the strip *down* of a *partially* secured lien which secures a claim
 26 whose only security is a lien on the debtor's principal residence. See Nobelman v. American Sav.
 27 Bank, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993). However, as detailed above, the Ninth
 28 Circuit held in Zimmer that § 1322(b)(2) does not prevent strip *off* of a *wholly* unsecured lien. Zimmer,
 313 F.3d at 1223.

1 In the present case, Debtor believes the Mesa Verde Property is worth \$215,000.00. *See*
2 *Declaration of Kristen Gilbert* ¶ 3 and Debtor's *Schedule A*, both filed herein. It is well settled that an
3 owner's opinion is admissible in determining the value of real estate or personal property. *See, e.g.,*
4 Kestenbaum v. Falstaff Brewing Corp., 514 F2d 690 (5th Cir. 1975); Justice v. Pennzoil Co., 598 F2d
5 1339 (4th Cir. 1979).

6
7 As established through Debtor's opinion of value, the EMC Second Mortgage is wholly
8 unsecured and, therefore, does not qualify as a secured debt under 11 U.S.C. § 506(a). Specifically,
9 the \$242,591.00 Homeq First Mortgage exceeds the \$215,000.00 value of the Mesa Verde Property,
10 leaving no value or equity available to secure the EMC Second Mortgage. As a result, the EMC
11 Second Mortgage should be reclassified as a general unsecured claim to receive pro rata with other
12 general unsecured creditors, as proposed in Debtor's Chapter 13 Plan filed herein. In addition, the
13 EMC Second Mortgage should be removed and stripped from the Mesa Verde Property negating and
14 nullifying any right or interest as a secured creditor under state law.
15

16 **III. CONCLUSION**

17 Based on the above points and authorities, Debtor respectfully requests the following relief:

18 1. That this Court exercise its authority under Fed. R. Bankr. P. 3012 to determine
19 and establish that the value of the Mesa Verde Property is \$215,000.00;
20

21 2. That this Court find pursuant to 11 U.S.C. §506(a) that the EMC Second
22 Mortgage is not a secured claim in this Case;

23 3. That this Court find the EMC Second Mortgage may be modified and
24 reclassified as a general unsecured claim and that any purported security interest or rights of the EMC
25 Second Mortgage in the Mesa Verde Property be avoided, nullified and negated, as proposed in
26 Debtor's Chapter 13 Plan and as authorized by 11 U.S.C. §§ 506(a) and 1322(b); and
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DATED this 15th day of November 2009.

/s/ *Tricia M. Darby*

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